85-574

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAURICE THOELE, LOUIS ARADO, HUGH HERATY, GARVIN NIX, JOSEPH LORENZ, MICHAEL GRIEGEL, WILLIAM McCORRY, DENNIS JYRKOWSKI, JOSEPH MUCIA, ROBERT MURRAY, JAMES ORR, RICHARD KIMBLE, JOHN KACHKA, ALEX McCRAE, FRANK SADLER, THOMAS MINASOLA, GEORGE HEAD, LEONARD MIJKA, JOHN VOLLAND, RONALD JABLON, RICHARD RICCIO, ARTHUR BISCHOFF, JAMES GEOGHEGAN, JOHN DUFFY, DANIEL McCRORY, WILLIAM DEVONEY, ROY WALKER, ALBERT POHL, ROBERT KEATING, RUSSELL ALONGI, KENNETH BRINGE, JOHN CULLOTON, JOHN TOLLEY, JOHN J. MURPHY, HUGH O'MALLEY, CARL NEUMULLER, JAMES BEGLEY, JAMES MORGAN, WILLIAM O'BRIEN, RAYMOND GREENWOOD, THOMAS CRONIN, THOMAS BRADY, TERRENCE McCUE, ROBERT TILL, FRANKLIN CRAWFORD, RAYMOND GIEHOOB, DANIEL MORAN, PATRICK LOGAN, TERRENCE FORBES, RALPH MORETH, JAMES P. BROWN, PAUL C. CEFFALIO and CHARLES R. LOFTUS, individually and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF CHICAGO, CHICAGO POLICE DEPARTMENT, RICHARD J. BRZECZEK and CHARLES H. POUNIAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether civil service employees have a protected property or liberty interest in the procedures used to determine promotions which are required by law to be based on merit.

LIST OF PARTIES

In addition to the parties contained in the caption of the case in this Court, plaintiffs below included the following:

WILLIAM C. BIGBY, JR., CURTIS B. BONDS, MAURICE BROWN, ALBERT COX, JR., JAMES W. CRAIG, HOSEN CROSSLEY, DANIEL A. GIBSON, NOLON B. HAWKINS, ALBERT C. HENRY, CECIL B. HOCKETT, HUBERT M. HOLTON, EUREL JACKSON, ELMER LEWIS, ROOSEVELT LOWE, THURSTON MCCLENDON, JR., EARL J. MCGHEE, SR., LEROY O'SHIELD, ERNEST SILER, WILLIAM SHAW, JR., WILLIAM THOMPSON, LAMORNE C. THREET, WILLIE WILLIAMS and JULIUS A. YOUNG.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners MAURICE THOELE, LOUIS ARADO, HUGH HERATY, GARVIN NIX, JOSEPH LORENZ, MICHAEL GRIEGEL, WILLIAM MCCORRY, DENNIS JYRKOWSKI, JOSEPH MUCIA, ROBERT MURRAY, JAMES ORR, RICHARD KIMBLE, JOHN KACHKA, ALEX MCCRAE, FRANK SADLER, THOMAS MINASOLA, GEORGE HEAD, LEONARD MIJKA, JOHN VOLLAND, RONALD JABLON, RICHARD RICCIO, ARTHUR BISCHOFF, JAMES GEOGHEGAN, JOHN DUFFY, DANIEL MCCRORY, WILLIAM DEVONEY, ROY WALKER, ALBERT POHL, ROBERT KEATING, RUSSELL ALONGI, KENNETH BRINGE, JOHN CULLOTON, JOHN TOLLEY, JOHN J. MURPHY, HUGH O'MALLEY, CARL NEUMULLER, JAMES BEGLEY, JAMES MORGAN, WILLIAM O'BRIEN, RAYMOND GREENWOOD, THOMAS CRONIN, THOMAS BRADY, TERRENCE MCCUE, ROBERT TILL, FRANKLIN CRAWFORD, RAYMOND GIEHOOB, DANIEL MORAN, PATRICK LOGAN, TERRENCE

FORBES, RALPH MORETH, JAMES P. BROWN, PAUL C. CERFALIO and CHARLES R. LOFTUS, both individually and on behalf of all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 1, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in the Appendix. The opinion of the United States Court of Appeals for the Seventh Circuit in *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666 (1982), which was overruled by the opinion below, is set forth in the Appendix. The opinion of the United States District Court for the Northern District of Illinois in this case is set forth in the Appendix.

JURISDICTION

The Court of Appeals entered judgment on July 1, 1985. Appendix at A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Due Process clause of the Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . .

U.S. Const. Amend. XIV, §1.

Section 10-1-13 of the Illinois Municipal Code provides, in relevant part:

> The [civil service] commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion.

Ill. Rev. Stat. ch. 24, §10-1-13 (1983).

Section 25.1-1 of the Municipal Code of the City of Chicago provided, until 1981:

> It is the general purpose of this ordinance and it is necessary in the public interest, to establish a system of personnel administration that meets the social, economic, and program needs of the people of the City of Chicago, to provide for a professional and progressive merit system for employment and to insure flexible career service within the City of Chicago by substituting a public employment system superseding the Civil Service System now operating within the City of Chicago pursuant to the law of the State of Illinois.

The Section currently provides:

> It is the general purpose of this ordinance and it is necessary in the public interest to establish a system of personnel administration that meets the social, economic, and program needs for the people of the City of Chicago, to provide for a professional and progressive merit system for employment and to insure flexible career service within the City of Chicago.

Chicago, Ill., Mun. Code, §25.1-1 (1977); *Id.*, §25.1-1 (1982).

The Personnel Code of the City of Chicago provides, in pertinent part:

> All examinations shall relate to those matters which will test fairly the capacity and fitness of the applicant to perform efficiently the duties of the position.

Chicago, Ill., Personnel Code, Rule VI, §2 (1981).

STATEMENT OF THE CASE

STATEMENT OF FACTS

After federal court decisions invalidating a number of employment practices of the Chicago Police Department, the Department, the City of Chicago and the Department of Personnel of the City of Chicago, defendants-appellees below and respondents herein, began the preparation of an examination for the promotion of sergeants to lieutenant. Preparation was initiated in September, 1974 and completed in 1977. The examination was intended to ascertain and measure relative merit and abilities among applicants for lieutenancies.

The preparatory tasks undertaken centered around a "task analysis" meant to identify relevant job functions and skills for lieutenants. Interviews were conducted with 30-40 field lieutenants during which a questionnaire was answered, and a second questionnaire was subsequently submitted to 20 additional lieutenants. Based upon the questionnaire results defendants determined that a written test followed by a "job assessment" center would be the appropriate means by which to measure relevant abilities for promotions to lieutenant. This preferred approach was not implemented, however, ostensibly because of the expense, although no cost estimate was ever prepared.

Instead, defendants chose a promotion test comprised of three parts, a written examination, an oral interview and the average of the applicant's last four performance ratings as a sergeant. The results of each part were weighed, 40 percent, 30 percent, and 30 percent, respectively, and then combined to produce a composite score. This composite score was used to rank applicants for the final promotion eligibility list from which new lieutenants were to be selected.

The examination was taken during 1977 by 1062 applicants and composite scores ranged from 70 to 95.91. As of the time of the District Court decision in this case, the top 108 persons on the list had been promoted in order based on their position on the eligibility list.

PROCEEDINGS BELOW

This litigation has its roots in similar proceedings initiated 15 years ago. In 1974 the District Court invalidated various employment and promotion practices of the Police Department, *United States v. City of Chicago*, 385 F. Supp. 543 (N.D. Ill. 1974), *aff'd.*, 549 F.2d 415 (7th Cir.) *cert. denied* 434 U.S. 875 (1977). In that instance, the Court invalidated the Police Department's examination for promotion to sergeant as discriminatory and found that the examinations had no demonstrable relationship to successful job performance as sergeant. Similar findings were made with respect to procedures and examinations for hiring patrolmen. *United States v. City of Chicago*, 385 F. Supp. 543, 554-61. The sergeant's examination found faulty in that case was very similar to that challenged herein. *Id.* at 550. The Court prohibited the use of such examinations for purposes of determining promotions until defendants could establish the relation of the test to job functions or the absence of discriminatory impact. *Id.* at 546.

Plaintiffs in the present case were black sergeants who had taken the lieutenancy test described at p. 5, *supra*.[1] They initiated this proceeding in 1980 challenging the lieutenant's examination as a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Petitioners, white and hispanic sergeants who had also taken the lieutenant's examination, intervened as plaintiffs arguing that the examination was so deficient as to be arbitrary, thereby denying them rights protected by the Due Process Clause of the Fourteenth Amendment. Defendants were the City of Chicago, the Chicago Police Department, the Superintendent of the Police Department at the times relevant to this case, and the Director of the Chicago Personnel Department at the times relevant to this litigation. A bench trial was held by the District Court and the Court issued its decision and order on April 18, 1984. See Appendix at A-11 to A-29.

The Court's decision dealt at length with the serious inadequacies of the lieutenant's examination. The Court found that plaintiffs had established a *prima facie* case that the test had a discriminatory impact upon blacks in its entirety and with respect to its component parts. The Court also found that defendants had failed, in response to plaintiffs' showing, to carry their burden of demonstrating that the examination had a manifest relationship to the job of lieutenant. Further, the Court held that defendants wholly failed to show that the tasks on the examination, in whole and in part, substantially represented the tasks required of lieutenants, or in any significant way measured the skills relevant thereto. Based on these findings, the Court ruled in favor of the

[1] See list of parties, *supra* at ii. Named plaintiffs represent a class of all black persons adversely affected by the lieutenant's examination certified by the District Court pursuant to Fed. R. Civ. P. Rule 23(b)(2).

original plaintiffs and found the examination to be in violation of Title VII. Inexplicably, however, the Court did not find that plaintiffs-intervenors, petitioners herein, were entitled to relief even though the examination was clearly not job-related. Instead, the Court stated that a finding of a lack of job-relatedness for the purposes of a Title VII claim was not necessarily equivalent to a finding that the examination was also arbitrary and capricious so as to deprive petitioners of Due Process and merely denied relief without considering petitioners' claims.[2]

Petitioners appealed the District Court's decision to the Seventh Circuit Court of Appeals.[3] The issue presented for review was whether a civil service promotional procedure found to yield results unrelated to the ability of applicants to perform the job for which they were being tested violated applicants' due process rights. Petitioners noted in their brief that *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666 (7th Cir. 1982) ("*DiIulio*") established that applicants for civil service promotions have a liberty interest in merit-based promotional procedures, suggested without extensive discussion that petitioners also had a property interest therein, and argued more fully that the facts established by the District Court required a finding that the examination did not measure "ascertained merit" or have a "direct and substantial relation" to the job, pursuant to relevant law, thereby depriving petitioners of their Due Process rights. Respondents did not, in their brief, deny that petitioners had a protectible interest in the challenged promotional

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[2] The Court's finding implicitly accepted the necessary premise that petitioners had a protectible interest in defendant's promotional procedures sufficient to support a due process claim.

[3] Neither plaintiffs nor defendants below appealed the lower court opinion. Therefore, the District Court's decision that the promotional examination did not measure applicants' abilities for lieutenancies was not challenged and is not at issue.

procedures but argued only that the evidence did not support a finding that the procedures were arbitrary and capricious. Petitioners, therefore, did not discuss the protectible interest question in their reply brief. On oral argument, the question of whether a protectible interest existed arose only through scattered questioning and was not discussed by either side at length. Respondents, in fact, conceded the continuing validity of *DiIulio* and did not request that it be overturned.

The Court of Appeals issued its decision on July 1, 1985 affirming the District Court decision. In its opinion, the Court noted that the basis for the District Court's conclusion that the examination was not arbitrary and capricious was "unexplained". The Appeals Court went on to state that, if there were a constitutional right involved, it would have been forced to remand to the District Court for an explanation of its conclusion that a test which was not job-related was still adequate to meet constitutional standards.

The Appeals Court, however, did not so hold because, in its judgment, petitioners did not have either a liberty or property interest in merit-based civil service promotional procedures. With respect to a property interest, the Court recognized that the job of a tenured civil servant is property and, further, that state and municipal law require civil service promotions to be based on "ascertained merit," seniority and examination. The Court found that these provisions create an expectation that promotional procedures will be fair; the Court concluded, however, that such an expectation did not constitute property for constitutional purposes. In reaching its conclusion, the Court assumed that only a limited number of lieutenants would be available and therefore no applicant could "expect" that a good grade on an examination would lead to a promotion. Further, the Court's conclusion rested on

the assumption that promotional decisions, notwithstanding the statutory provisions, are essentially discretionary, and more so "as one moves up in a hierarchy". Since promotions were not governed by fixed rules and promises, in the Court's mind, there was no entitlement to a fair promotional examination as a matter of right.

The Court similarly dismissed the concept that a liberty interest was involved, and explicitly overruled *DiIulio* in so holding. The Court again recognized that a person may have a liberty interest in an occupation or job. The Court reasoned, however, that ranks within an occupation are not "occupations" in and of themselves. Therefore, the Court held, that while preventing someone from advancing in his occupation is a "cruel deprivation" it does not constitute a constitutional deprivation of liberty.

Finally, the Court found that even assuming a constitutional right to job-related promotional examinations, no due process violation inhered in petitioners' failure to pass a poorly designed test, although the Court conceded that a valid state claim might lie. The Court felt that such a constitutional violation would be present only if the challenged state practice were "deeply repulsive to the feelings of Supreme Court Justices" and that a "stupidly designed" and "hopelessly maladapted" examination did not so shock its conscience. The Court also relied, in part, on the idea that a state forum would be sufficient to address petitioners' claims in that respect.

Pursuant to Rule 16(e) of the Seventh Circuit's Rules of Practice, the Court's opinion was circulated to all judges of the Court; no judge voted to rehear the case *en banc*.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

A. The Decision Below Will Have Major Consequences For The Public Interest And Involves An Issue On Which Federal Courts Have Reached Conflicting And Uncertain Conclusions.

The federal government, most states and a large number of municipalities and other governmental bodies have established civil service systems for their employees. Such systems typically govern the means and criteria by which significant employment decisions are to be made, including hiring, transfers, promotions, salary increases, disciplinary actions and discharges. Millions of public employees and their employers are substantially affected by any significant change in the nature and scope of civil service procedures such as those involved in the decision below.

Civil service systems are grounded on the fundamental premise that merit, rather than politics, nepotism, or whimsy should be the basis for all significant public employment decisions. Employees are to be assured of fair and consistent treatment based on their respective abilities, diligence, and quality of work. On the other hand, public employers are provided with a system of incentives by which they can encourage and reward meritorious performance and discourage or eliminate incompetence and laziness. A properly designed and operated civil service program must carefully balance these protections and the resulting expectations of both sides; the end result is intended to be the promotion and preservation of a stable and professional work force capable of providing efficient and effective government services, for the benefit of the

public in general. *People v. Errant*, 229 Ill. 56, 61, 82 N.E. 271 (1907); *see Arnett v. Kennedy*, 416 U.S. 134, 148-50 (1974).

The promise of merit-based employment decisions which is at the core of this balanced system is only meaningful to the extent employers are willing and able to accurately identify and measure merit as it is relevant to the employment decision in question. The objectives of civil service systems will be thwarted if merit either cannot be measured, or is not properly ascertained, with respect to important personnel questions. In turn, the ability of employees to enforce the proper determination of merit where employers are unwilling to do so is critical to assure the effective operation of the entire system and the protection of employers' rights. Accordingly, the issue presented herein, the extent to which the federal Constitution protects civil service employees' rights to expect equitable, merit-based decisions, is of critical importance not only to the parties in this case and their counterparts across the country but also to the public. The issue presented by this case is therefore appropriate for the issuance of a writ. *Labor Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951); *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

In addition, while an "open and embarassing" conflict between federal Courts of Appeals may not exist with respect to this issue, there is a substantial degree of uncertainty and disagreement over the proper resolution of this question among various federal courts. This confusion is evidenced quite clearly by the Seventh Circuit's rapid reversals on this issue; as the Court below notes, it has reversed itself twice in six years. Compare *Webster v. Raymond*, 599 F.2d 793 (7th Cir. 1979) with *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666 (7th Cir. 1982); and compare *DiIulio* with the decision below. Other decisions within the Circuit also reflect a

fundamental rift concerning the appropriate determination and scope of constitutional property rights in civil service employment decisions. *See Vail v. Board of Education of Paris Union School District No. 95*, 706 F.2d 1435 (7th Cir. 1983) (2-1 decision, Posner, J., dissenting); and *Begg v. Moffitt*, 555 F.Supp. 1344 (N.D. Ill. 1983); *see also Hermes v. Hein*, 511 F.Supp. 123 (N.D. Ill. 1980), *aff'd in part* 742 F.2d 350 (7th Cir. 1984).

The conflict and uncertainty experienced by the Seventh Circuit is not peculiar to that Court but reflects the difficulty and importance of the issue and the large degree of uncertainty in the federal courts as to its proper resolution in the absence of a definitive Supreme Court decision. While the issue may have fortuitously been raised more frequently in this Circuit, other federal courts have experienced similar difficulties and conflict in their initial attempts at reaching a proper decision. The First Circuit has also struggled with this issue, stating, without so ruling, that Massachusetts statutory language very similar to the Illinois statute here may indeed create a property interest in fair evaluations for civil service promotions. *Lavash v. Kountze*, 604 F.2d 103, 105 (1st Cir. 1979). Several other Circuits have rejected a property or liberty interest claim only because, on the facts of the particular case, the applicant's claim for promotion had not been perfected, implying that on better facts a property interest might exist. *Robb v. City of Philadelphia*, 733 F.2d 286 (3d Cir. 1984); *Doyle v. University of Alabama*, 680 F.2d 1323 (11th Cir. 1982) (salary recommendation). Still other Circuit Courts have addressed the issue in cases where no statute existed, where the statute permitted substantially greater discretion in promotional procedures than Illinois laws, and in university tenure cases which generally involve decision-making processes less circumscribed then civil service promotions; again, the implication is that with a stronger statutory or factual basis, a

property or liberty interest might properly exist. *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984); *Beitzell v. Jeffrey*, 643 F.2d 870 (1st Cir. 1981); *Burns v. Sullivan*, 619 F.2d 99 (1st Cir. 1980); *Clark v. Whiting*, 607 F.2d 634 (4th Cir. 1979). Thus while other Circuits have rejected particular claims of property or liberty rights based on facts and circumstances significantly less supportive of such claims, than the current case, they have uniformly refused to categorically reject, as the decision below does, the potential existence of an entitlement, given proper facts.

The District Courts have reacted in a similar fashion although the conflict with the Seventh Circuit is even clearer. District Courts have explicitly found a protected interest in merit based promotional procedures for civil servants, contrary to the decision below. *Ka Nam Kuan v. City of Chicago*, 563 F.Supp. 255 (N.D. Ill. 1983); *International Ass'n of Firefighters, Local 2069 v. City of Sylacauga*, 436 F.Supp. 482, 489-90 (N.D. Ala. 1977). Other District Courts have implied the existence of constitutional interests. *Bara v. Aurora Civil Service Commission*, 580 F.Supp. 212 (N.D. Ill. 1983); cf. *Catrone v. Massachusetts State Racing Commission*, 404 F.Supp. 765 (D. Mass. 1975).

The uncertainty and diversity of viewpoints outlined above demonstrates a state of instability not only in the lower courts but also necessarily reflects a similarly volatile environment for all affected parties, whose rights and obligations are unclear and shifting. This is especially true for civil service agencies in the Seventh Circuit, which have been subject to dramatic instability over the past several years. Given the conclusions of other federal courts to date, it appears likely that the conflict and confusion will increase rather than decrease over time, rather than being conclusively resolved by the lower courts. The facts of this case present a clear opportunity for this Court to rule on the issue and to definitively clarify the

law in this area, thereby permitting all affected parties nationwide to effectively establish and operate their civil service programs. The diversity of opinions in the lower courts, the need to resolve the issue for the effective operation of government across the country, and the number of persons affected by the issue and the decision below, makes this case one of sufficient importance to justify the issuance of a writ by this Court. *United States v. Constantine*, 296 U.S. 287, 290 (1935).

B. Petitioners Have Established A Constitutional Property Interest In Promotional Procedures Which Measure Job-Related Merit.

This Court established its framework for analysis of property interests in employment in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Roth*, the Court held that for a person to have a property interest in a benefit, he must have a "legitimate claim of entitlement to it". Such property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits". *Roth, supra*, at 577. Understandings may not be abstract or unilateral but must be mutual and explicit. *Id.*; *Sindermann, supra*, at 601. Sources of protected property rights may include not only written statutes, regulations, rules and judicial decisions but also implied contracts, *Bishop v. Wood*, 426 U.S. 341, 344 (1976), well-established patterns of practice or any other identifiable means creating mutual cognizable expectations.

The types of interests which the Court has determined to be protected as property are "varied and, as often as not, intangible, relating to 'the whole domain of social and economic fact' ". *Logan v. Zimmerman Brush Co.*, 455

U.S. 422, 430 (1982). This Court, then, has sought to define "property" in a manner which reflects its practical significance for people, i.. furtherance of the idea that it "is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Roth, supra,* at 577.

Unfortunately, the decision of the Seventh Circuit fails to comprehend the importance of merit-based promotions to civil servants and their reliance upon procedures designed to protect that interest. The abstractness of the Court's decision is compounded by its failure to consider the numerous bases creating a protected property interest. As outlined in detail below, the sources of law and mutual understanding herein include state statute, municipal ordinance and regulations, federal court decisions, and the promises and practices of defendants with respect to their promotional procedures for lieutenants. The combination of these factors leaves little doubt as to the existence of a property interest protected by the Constitution.

The Illinois Municipal Code expressly provides that a civil service commission

> shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion.

Ill. Rev. Stat. ch. 24, § 10-1-13 (1983). Pursuant to this statutory directive the City of Chicago Municipal Code provided, until 1981, that

> It is the general purpose of this ordinance and it is necessary in the public interest, to establish a system of personnel administration that meets the social, economic, and program needs of the people of the City of Chicago, to provide for a professional and progressive merit system for employment and to insure

> flexible career service within the City of Chicago by substituting a public employment system superseding the Civil Service System now operating within the City of Chicago pursuant to the law of the State of Illinois.

Chicago, Ill., Mun. Code, § 25.1-1 (1977).[4] In order to effectively implement the examination requirement of the Illinois statute, the City Personnel Code provides that

> All examinations shall relate to those matters which will test fairly the capacity and fitness of the applicant to perform efficiently the duties of the position.

Chicago, Ill., Personnel Code, Rule VI, § 2 (1981).

On their face, these laws unambiguously require that promotions be based on "ascertained merit" and seniority;[5] merit is, in turn, to be ascertained through examination which must fairly test the abilities of the applicant relative to the functions of the job to which he is seeking promotion. It would be difficult to envision and articulate a clearer entitlement to promotional procedures which fairly determine job related ability. Illinois courts have repeatedly interpreted such clear requirements to be mandatory upon the applicable public officials. *See People v. Nicholls*, 45 Ill.App.3d 312, 316, 359 N.E.2d 1095, 1099 (5th Dist. 1977), *aff'd in part and rev'd in part on other grounds*, 71 Ill.2d 166, 374 N.E.2d 194 (1978).

In particular, Illinois courts have found that such provisions severely circumscribe the discretion of civil service employees by replacing such discretion with merit-based

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[4] This provision was revised in 1981 without substantially affecting its intent or meaning. See Chicago, Ill., Mun. Code, § 25.1-1 (1982) at page 3, *supra*.

[5] The use of seniority is based implicitly upon merit as well; the law merely permits civil service agencies to presume that an applicant has obtained knowledge, skills, and judgment through his job experiences which are related to the position for which he is applying.

procedures for promotions. *See People v. Foster*, 67 Ill.2d 496, 367 N.E.2d 1320 (1977); *Burns v. Sheriff's Department Merit Comm'n*, 86 Ill.App.3d 226, 407 N.E.2d 1134 (4th Dist. 1980). The courts have found that the relegation of promotion decisions to unbridled discretion is inconsistent with the basic requirement that such decisions be merit-based. *Burns v. Sheriff's Department Merit Comm'n, supra*; *see People ex rel. Gaynor v. Board of Fire and Police Commissioners*, 14 Ill.App.2d 329, 144 N.E.2d 763 (1957) (once eligibility list is complete duty to promote from list is clear, ministerial, and enforceable by mandamus); *People ex rel. Cadell v. Board of Fire and Police Commissioners*, 345 Ill.App. 415, 103 N.E.2d 666 (4th Dist. 1952). Illinois courts are therefore unwavering in support of the clear terms of the law: promotions must be based on merit.

This interpretation does not prohibit the fair use of professional judgment as one part of a promotional procedure designed to assess applicants' abilities. Courts have noted that the precise means of ascertaining applicants' merit is left by law to the judgment of the civil service commission. *Lenert v. Wilson*, 56 Ill.App.2d 325, 206 N.E.2d 294 (1st Dist. 1965). Further, the inclusion of a superior's rating or efficiency ratings by superiors as *one element* of a merit-based promotional procedure has been approved where carefully circumscribed. *Zuelke v. Board of Fire and Police Commissioners*, 79 Ill.App.3d 1080, 398 N.E.2d 1080 (1st Dist. 1979). The method chosen by the commission to determine promotions must still fairly identify applicants' merit, however, as must the means of rating applicants' prior performance and efficiency. The principled use of ratings, guided by criteria related to merit, does not render a procedure "discretionary"; if ratings were truly unguided and discretionary, or if they were so influential as to be determinative of the applicant's final score, their use would be inconsistent with the require-

ments of the statute. *Burns, supra*; *see Hauri v. Batzel*, 71 Ill.App.3d 164, 389 N.E.2d 257 (2d Dist. 1979).

In this sense, the Court below erred in finding that the Illinois law relied upon here does not create anything but a discretionary promotional procedure.[6] The Court cites *Sullivan v. Board of Fire and Police Commissioners*, 103 Ill.App.3d 167, 430 N.E.2d 636 (2d Dist. 1981), for the proposition that the law did not intend to create a property right in merit-related promotional examinations. *Sullivan*, however, does not support such a broad conclusion; the applicant in that case was merely a probationary employee, and Illinois law specifically excludes probationary employees from civil service protections. The provisions of law with respect to petitioners herein were therefore not at issue. *Id.* Similarly, *McCoy v. Board of Fire and Police Commissioners*, 79 Ill.App.3d 742, 398 N.E.2d 1020 (1st Dist. 1979), cited for the proposition that promotions are discretionary under Illinois law, does not so hold. *McCoy* holds instead that where a statute provides that any one of the top three applicants on the eligibility list may be selected, the selection of such an applicant relative to his two competitors is discretionary. Such a narrow finding does not render the underlying procedure by which the eligibility list is determined discretionary and, in fact, such a conclusion is again patently inconsistent with the terms of the statute.

Similarly, in order to circumvent the clear intent and purpose of Illinois law, the Court rested its analysis on assumptions which are without basis in fact or law. For example, the Court's decision concludes that one has no right to a good efficiency rating, since such a rating is

[6] On its face, this conclusion means either that the Illinois General Assembly and Chicago City Council so inartfully drafted the law as to make it totally ineffectual or that the Illinois courts have eviscerated the law with their interpretations.

discretionary. The Court again confuses the exercise of professional judgment against merit-based criteria with unbridled discretion. Moreover, petitioners are not seeking to validate a "right" to a good rating; they are seeking recognition of the right to have ratings based on merit-related criteria and procedures, which adequately transform the process from one of pure discretion to one based on the fair and reasonable use of professional judgment. See *Hauri v. Batzel*, 71 Ill.App.3d 164, 389 N.E.2d 257 (2d Dist. 1979).

The Circuit Court also found that no property right was created because "with few lieutenancies available no one can have much confidence of doing well enough on the exam to become a lieutenant." This, again, confuses the issue, which is the right of petitioners to a fair and merit-based examination for promotion to lieutenant, not lieutenancies themselves. In that respect, petitioners' expectations are firmly and concretely grounded in state and municipal law. Moreover, the Court's assumption that only a few lieutenancies are available is openly contrary to the record. As the District Court noted, 108 applicants had already been promoted by the time of its decision, which is over 10 percent of the applicant pool. An able candidate, whose abilities are fairly ascertained, could certainly expect to perform well and thereby have a substantial likelihood of promotion. Such a likelihood is dramatically reduced or eliminated where ability is not properly measured.

The decision below also rested on the unsupported assumption that discretion plays a larger part in the promotional procedures for lieutenancies than for promotion to lower ranks, "since discretionary factors loom larger as one moves up in a hierarchy." Presumably, then, prospective lieutenants have less of a property interest than prospective sergeants. Yet Illinois and Chicago laws make no distinction between such ranks or their ability to rely

on merit-based promotion rather than arbitrary discretion. Captaincies are also subject to civil service protection. Only the top administrators and policy makers are left subject to the whim of political appointment. *Ill. Rev. Stat.* Ch. 24, § 10-1-17 (1983). *See People ex rel. Cadell v. Board of Fire and Police Commissioners*, 345 Ill.App. 415, 103 N.E.2d 666 (4th Dist. 1952). Accordingly, the conclusion that petitioners' interest in a fair and merit-based examination is somehow diminished due to their rank is unjustified in law or in fact.

In short, the Court of Appeals' conclusion that Illinois law and Chicago ordinances and regulations create only a unilateral or insubstantial expectation in merit-based promotion procedures is directly contrary to the applicable law and inconsistent with the facts of this case. Instead, the law strictly circumscribes the defendant's decision-making latitude, requiring merit-based promotion decisions, and examinations which fairly and accurately assess applicants' merit. Petitioners have a manifest and substantial interest in such examinations and decisions.

Assuming *arguendo*, however, that the combined effect of the statute, ordinance and regulation left any residual discretion in defendants' hands, such discretion has been erased by federal court decisions and the promises and practices of the defendants. As described at pages 5-7, *supra*, defendants were subject to a federal court decision ordering them to use promotional procedures which were not discriminatory and which accurately identified and measured job-related abilities. *United States v. City of Chicago*, 385 F.Supp. 543 (N.D. Ill. 1974), *aff'd* 549 F.2d 415 (7th Cir.), *cert. denied* 434 U.S. 875 (1977). The District Court's decision was issued prior to initial preparation of the lieutenant's examination challenged herein. While directly applicable only to patrolmen's sergeant's tests, the terms of the decision put defendants on notice that all similar promotional examinations, including those

for lieutenancies, would need to meet similar standards.[7] Thus, it would certainly be reasonable for petitioners to expect respondents to develop a lieutenant's examination which would be non-discriminatory and merit-based, and for respondents to do just that, consistent with the District Court's decision.[8]

Not only did both petitioners and respondents expect that meeting the obligations of Title VII and the District Court's decision would require a job-related promotion examination for lieutenant, both sides also understood that this particular examination was designed, administered and scored in a manner which was intended to ascertain candidates' merit to perform the duties of a lieutenant. It is clear from the City's preparation of the examination that it was striving to ensure that the test, in whole and in part, accurately measured ability relative to a lieutenant's job functions. Further, the City official in charge of test development testified below that he had represented to members of the police department that this lieutenant's examination would be and was a valid examination and would measure candidates' merit for the job of lieutenant. The same official, who also served as a rater for the oral examinations, indicated that candidates were aware of and understood this representation. A Deputy Chief of Police involved in the preparation and administration of the test testified unequivocally that both the testers and candidates expected the examination to ascertain

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[7] Several of the petitioners were intervenors in the earlier case and therefore were fully apprised of the earlier proceedings and decision.

[8] The District Court's finding that examinations were discriminatory and without a "manifest relationship to the employment in question," while technically benefitting only black policemen, necessarily also benefitted other officers as well, since any new nondiscretionary, job-related test would be given to all applicants. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). *See also Connecticut v. Teal*, 457 U.S. 440 (1982).

merit. Finally, the promotion of the top 108 sergeants on the eligibility list without exception, as determined by the results of the examination, confirms the City's understanding that promotions would be based solely on merit, as measured by the test, and dispels the notion relied upon by the Court below that such a list was essentially advisory or that selection therefrom was purely discretionary.[9]

In short, even if state law permitted some room for discretion in the promotional process for civil servants, in this instance, the respondents were under additional obligations to promote based on merit and had fully accepted such obligations, with the full knowledge and understanding of petitioners and other applicants. The Court of Appeals' conclusion, therefore, that the promotional examination was discretionary and need not be merit-based is wholly without foundation in this case. Accordingly, petitioners have demonstrated a concrete and substantial property interest based upon state law, municipal ordinance, federal court decisions and the explicit understandings between petitioners and respondents.[10]

This conclusion is consistent with this Court's decisions as well. Without a doubt, the right to be fairly tested for promotion is one which civil servants rely upon in their daily lives, not just with respect to the next available grade, but in deciding to join the service in the first place.

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[9] Rule VI of the Personnel Code, quoted above at page 4, was adopted in 1981, after the lieutenant's examination was taken, but nevertheless also is indicative of the City's intent and purpose with respect to promotional examinations.

[10] It should be noted that the Court of Appeals seems to rely as well on the theory that petitioners' right to seek a state remedy diminishes their claim of entitlement to constitutional protection. Such a conclusion is openly at odds with this Court's decisions. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). If anything, the Circuit Court's concession that petitioners may have a valid claim for relief under state law belies the validity of its arguments belittling the strength of state law guarantees as to merit-related promotions.

Roth, supra at 577; *Bishop v. Wood*, 426 U.S. 341, 353-4 (1976) (Brennan, J., dissenting). The statutory entitlement is as clear as that in *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985), in which this Court found a property interest in continued civil service employment. *See also Sindermann, supra.* Conversely, the statutory and judicial entitlements and mutual understandings are substantially stronger than those found lacking in *Bishop v. Wood, supra.* The property interest claimed herein is firmly within the scope of the types of interests grounded in state law which cannot be removed without "cause": petitioners have a tangible and significant interest in promotional evaluations based on merit, an interest at least as important as others found protected by this Court. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) and cases cited therein. Consequently, this Court should issue a writ and reverse the Seventh Circuit decision on the grounds that petitioners have a protected property right in merit-based promotional procedures.

C. Petitioners Have A Liberty Interest In A Meaningful Opportunity To Advance Within Their Profession Based On Their Qualifications.

This Court has long recognized that the Fourteenth Amendment protects individuals in the enjoyment of their chosen occupation. *Board of Regents v. Roth, supra,* at 572, citing *Meyer v. Nebraska*, 262 U.S. 390 (1923). This liberty interest in employment has consistently been protected in cases where the State interposes examinations or other barriers to entry in a profession or occupation. In such instances, this Court has held that barriers to entry must have a rational relationship to the applicant's qualifications or fitness to engage in the occupation. Thus, in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) and *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957), this Court held that while a State may impose standards for entry into the legal profession, such

requirements must be rationally connected with the fitness or capacity of the applicant to practice law. *See Graves v. Minnesota*, 272 U.S. 425, 428 (1926) (upholding a state requirement that an applicant for a dental license have a diploma from a reputable dental college, because the requirement had a "direct and substantial relation to [the plaintiff's] qualification to practice dentistry".) In *Konigsberg v. State Bar of California*, 366 U.S. 36, 41 (1961), the Court upheld State denial of an application for admission to the bar for failure to answer application questions only once it concluded that the questions had "substantial relevance" to the applicant's qualifications. This standard has also been applied to public employees. *Wieman v. Updegraff*, 344 U.S. 182 (1952). And, in *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666 (7th Cir. 1982), the Seventh Circuit extended similar liberty interest protection to applicants for promotion within the police department.

In overruling *DiIulio*, the decision below focused on only one premise, namely, that while the Constitution protects a person's liberty and right to engage in an occupation, ranks or subdivisions within an occupation are not an "occupation" in and of themselves. Therefore, petitioners, for example, would have no liberty interest in being able to seek employment as a police lieutenant, based on their abilities, since being a police lieutenant is not an "occupation" distinct from being a police sergeant.[11]

This distinction, however, while attractive in a superficial, abstract way, is inconsistent with the operations of the real world. The fact that the State imposes an examination as a barrier to entry to a higher rank, a barrier ostensibly based on ability, is a clear indication that the

[11] Apparently, the Court of Appeals defined "occupation" for purpose of this case to mean "police officer," including presumably, patrolmen and everyone up to and including Chief of Police.

state views the functions of persons holding such a rank as significantly different than those of the lower rank, at least significant enough to warrant a job-related test for promotion. Thus, in a very real sense, the State creates a distinct "occupation" when it deems it important enough to impose requirements for entry thereto, satisfaction of which is the only means by which a person can engage in that occupation.

Conversely, it is obvious that persons consider the ability to advance themselves, to aspire within an "occupation" as a valuable component of the right to employment. Freedom and fair opportunity to progress carries rewards of personal satisfaction and, typically, tangible benefits as well. People, in selecting an occupation, rely on such opportunities; the protection of such opportunities is a critical part of the civil service, in particular, which in its purposes and rules recognizes the value of a chance for fair advancement. Without the ability to progress, among other things, the liberty to engage in an occupation is rendered meaningless.[12]

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[12] The Court of Appeals' approach ignores this simple human fact. In its world, apparently, there is no difference between a pediatrician and a neurosurgeon, since both are doctors, even though special certification may be required for both specialities and most people would prefer not to have brain surgery performed by the former. Put differently, in the Court's view, a judge is a judge is a judge, or perhaps more accurately, a lawyer is a lawyer is a lawyer and therefore a lawyer practicing before local traffic court is no different than a Supreme Court Justice. Yet we know that lawyers aspire to judgeships and Court of Appeals' judges aspire to positions on the Supreme Court; such behavior merely reflects general human tendencies to distinguish between greater and lesser occupational roles and to seek the greater. The fair opportunity to so progress is a critical element of occupational liberty. This Court has recognized the value of such employment *opportunities* as opposed to mere *employment* in other contexts. See *Connecticut v. Teal* , 457 U.S. 440 (1982); *but see contra, Id.*, at 463, n. 3 (Powell, J., dissenting).

Third, acceptance of the analysis below would permit the evisceration of well-accepted liberty interests in occupation. Merely by redefining an "occupation" broadly, States (or judges) can eliminate rights to engage in discernible lines of work. For example, the "occupation" of educator could include elementary teachers, principals and college professors alike, swallowing any interest which one might have in engaging in such distinct occupations. Such a perspective is contrary to this Court's recognition of the difference between even tenured and non-tenured professors.[13] *See Sindermann, supra.* Moreover, the decision creates anomalous situation in that someone seeking to be hired as a police lieutenant from outside the Department would have a protected liberty interest in not being unfairly denied employment while someone seeking promotion from within would not be so protected.

In short, the distinction created by the Court below seriously misperceives the nature and importance of the liberty interest inherent in rational, merit-based procedures for promotion and is destructive of existing rights

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[13] It is interesting to note that the author of the opinion below has utilized distinctions between types of teachers in order to justify the conclusion, perhaps not surprisingly, that professors may have property rights in employment while high school football coaches do not. *See Vail v. Board of Education of Paris Union School District No. 95*, 706 F.2d 1435, 1451 (7th Cir. 1983) (Posner, J., dissenting). In *Vail*, Judge Posner relied upon Daniel Webster to assert that "no description of private property has been regarded as more sacred than college livings. They are the estates and freehold of a most deserving class of men . . .", thereby invoking a special "judicial solicitude" for college teachers. *Id.* Apparently, depending on a Judge's view of the social value of professions, a property or liberty interest in employment may or may not exist; apparently, policemen are more like football coaches than college professors, and their employment interests are not as deserving of "judicial solicitude." Such analysis reeks of the type of result-oriented, substantive due process analysis found distasteful by the Court below.

as well. Accordingly, this Court should issue a writ and reverse the decision below on the grounds that petitioners have a protected liberty interest in job-related, merit-based promotional procedures.

D. The Court Below Departed From The Accepted Course Of Judicial Proceedings In A Manner Sufficient To Warrant An Exercise Of This Court's Supervisory Powers.

As noted briefly above, the District Court in this case, while assuming that petitioners had a protected interest in merit-related promotion procedures, failed, for whatever reason, to rule on the merits of petitioners' claims. This failure is especially peculiar in light of the District Court's excoriation of respondent's procedures and its conclusion that the test was not job-related. Necessarily, an absence of relationship to the job means that the examination was arbitrary. It would appear, therefore, assuming petitioners have a protected constitutional interest in merit-based (job-related) procedures, and given a conclusion that such procedures were arbitrary, that petitioners were clearly deprived of their constitutional rights, and the Court should have so held. The Court of Appeals indicated that, in fact, the District Court's failure would constitute reversible error but for the Seventh Circuit's finding that petitioners had no protected constitutional interest.

The proceedings before the Court of Appeals were perhaps even more fundamentally contrary to proper judicial procedure. The issue presented for appeal did not involve the question of whether a protected constitutional interest existed. That question was decided in favor of petitioners below, albeit implicitly, the *DiIulio* decision was apparently good law and fully applicable to the case at bar, and respondents never challenged the existence of such an interest. Thus, the only issue on appeal was whether the

District Court had erred in not ruling on petitioners' claims.[14]

As a result, petitioners (appellants below) did not, and had no reason to, know that the Court of Appeals contemplated the overruling of *DiIulio* or the examination of the question of the existence of property or liberty interests. Petitioners did not brief the issue below; respondents (appellees) did not challenge the validity of *DiIulio* or the existence of a protected interest in their brief. On oral argument, the issue was not extensively discussed, although the value of such a discussion would have been of dubious value since neither side was aware that the issue was being considered. Consequently, the decision of the Court below was reached without benefit of briefs and informative oral argument and parties were denied notice of the issue and any meaningful opportunity to present argument thereon.

Such a fundamentally flawed procedure has never been allowed to stand by this Court with respect to the rights of litigants on trial. As a bare minimum, the basic concept of due process involves notice of the opposing claims and a meaningful chance to respond. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

At the appellate level, this concept is no less applicable where a new issue is raised without warning. Such a process not only deprives the parties of a meaningful appeal but encourages judicial overreaching and results, as often as

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[14] More precisely the question presented for review was: "whether a civil service promotional examination and procedure violates the Due Process rights of the applicants when the examination and procedure is found by the trial court to yield results unrelated to the ability of the applicants to perform the job being tested for." Appellant's Initial Brief at 2.

not, in bad law.[15] A decision reached by a judge without benefit of participation by the parties hardly inspires confidence in the result, relative to normal appellate procedure involving a focused and considered deliberation of issues by counsel and the court.

The Seventh Circuit's independent and expansive reinterpretation of issues and denial of meaningful opportunity for argument thereon, combined with the District Court's failure to rule on petitioners' claims, means that petitioners have effectively been deprived of a fair chance to litigate their claim. Such substantial overreaching and procedural unfairness is a proper ground of issuing a writ of certiorari and for the exercise of this Court's supervisory powers. *Fountain v. Filson*, 336 U.S. 681 (1949).

CONCLUSION

The decision below attempts to resolve an important federal question of considerable difficulty and uncertainty. In its haste to reach a desired resolution of the issue, however, the Court refused to permit the parties an opportunity to participate and, as a result, its opinion seriously misinterprets the law and ignores the facts of the case entirely, choosing to substitute hypothetical circumstances which more nearly justify the result, in the manner of a law school examination for public employees and the proper functioning of civil service programs at

[15] The Court of Appeals essentially concedes this point in its opinion, relying on the absence of oral argument and deficiencies in briefing to explain the decision in *DiIulio*. Yet its own procedures herein resulted in virtually no briefing or argument on the issue it deemed critical, implying that the value of its own opinion necessarily must be even more suspect.

every level of government. It is essential that a well-considered and sensitive decision be made, with full opportunity for argument. Petitioners, therefore, respectfully request that this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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